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11 SUPERIOR COURT OF CALIFORNIA  
12 COUNTY OF SANTA CRUZ  
13 UNLIMITED JURISDICTION  
14

15 GARY REDENBACHER,  
16 Plaintiff,  
17 vs.  
18 JURIS PUBLISHING, INC.;  
19 MICHAEL KITZEN; and,  
20 DOES 1 through 100, inclusive,  
21 Defendants.

Case No.: \_CV 149760\_

[CLASS ACTION]\_\_\_\_\_

**PLAINTIFF'S OPPOSITION TO  
DEMURRERS BY DEFENDANTS  
JURIS PUBLISHING, INC. AND  
MICHAEL KITZEN TO FIRST  
AMENDED CLASS ACTION  
COMPLAINT**

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Hearing: January 6, 2005  
Time: 8:30 a.m.  
Department: 9  
Judge: Hon. Arthur Danner  
Action Filed: August 26, 2004  
Trial Date: None set

1 Gary Redenbacher brings this class action Complaint against defendants Juris Publishing,  
2 Inc., Michael Kitzen, and their agents for their violations of the federal Telephone Consumer  
3 Protection Act, 47 U.S.C. §227<sup>1</sup>, trespass, and conversion based on their sending of unsolicited fax  
4 advertisements to him and other Californians. Beginning before or about early 2004, defendants  
5 engaged in a campaign in California to market and sell their products by faxing advertisements to  
6 Redenbacher and others. To do so, defendants seized control of their victims' fax machines and  
7 stole their paper and ink. Redenbacher seeks penalties and damages based on this conduct and an  
8 injunction to stop it.

9 Redenbacher's claims for trespass and conversion are premised on black letter law.  
10 Redenbacher claims that, by defendants' preventing him from using his fax machine, and by  
11 defendants' stealing his paper and ink, defendants committed a trespass to chattels. Defendants  
12 also converted his paper and ink by preventing him from ever using them again.

13 For the reasons set out below, the Demurrers should be overruled, and defendants should be  
14 ordered to respond to the First Amended Complaint within ten days of the ruling.

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26 <sup>1</sup> In 1991, Congress barred advertisers from sending unsolicited faxes to businesses and  
27 consumers, who had been forced to pay in wasted ink, paper and occupied telephone lines for the  
28 privilege of receiving ads that they did not want. The federal Telephone Consumer Protection Act  
(T.C.P.A.) of 1991 provides that “[i]t shall be unlawful for any person within the United States to  
use any telephone facsimile machine, computer, or other device to send an unsolicited  
advertisement to a telephone facsimile machine.” 47 U.S.C. § 227(b)(1)(C). The T.C.P.A. allows  
a fax recipient to claim penalties and an injunction.



1 which the trespass-to-chattel tort protects, and indeed trivializes it.” *Id.* The Court then made its  
2 lone reference to faxes, the reference on which defendants’ base their entire argument:

3 if a chattel’s receipt of an electronic communication constitutes a trespass to that chattel,  
4 then not only are unsolicited telephone calls and faxes trespasses to chattel, but unwelcome  
5 radio waves and television signals also constitute a trespass to chattel every time the viewer  
6 inadvertently sees or hears the unwanted program.

6 *Id.*

7 Of course, the Court’s statement regarding “faxes” relates to the discussion about whether  
8 *content* in itself could convert a communication to a trespass. The *Intel Corp.* rationale is  
9 inapposite to Redenbacher’s claims, because he doesn’t contend that he was injured by the content  
10 of defendants’ fax, nor was he injured by defendants’ causing his fax machine display screen to  
11 display “Incoming Call—Juris Publishing, Inc.” Rather, Redenbacher contends that he was injured  
12 by the dispossession of his fax machine and the consuming by defendants of his paper and ink.  
13 The *Intel Corp.* court is correct--it is not the mere “receipt of an electronic communication that  
14 constitutes a trespass to that chattel.” As Redenbacher pleads, it is the consumption of the  
15 tangibles and the dispossession of the fax machine.  
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17 And, there is another ready basis for distinguishing the claims of the *Intel Corp.* plaintiff  
18 from those of Redenbacher. The *Intel Corp.* court stressed that Intel did not claim its computers  
19 were slowed down, “nor was there any evidence transmission of the messages imposed any  
20 marginal cost on the operation of Intel’s computers.” *Intel Corp. v. Hamidi*, 30 Cal.4th at 1353.  
21 Redenbacher, on the other hand, alleges consumption of paper and ink, which have a cost. *See*  
22 Request for Judicial Notice, attached hereto and filed herewith. In short, defendants’ cited *dicta* is  
23 simply misleading when read out-of-context and wholly irrelevant when read in context.  
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25 Indeed, the one court that did address the issue of whether an electric signal may cause a  
26 trespass, in a case cited over ten times in the *Intel Corp.* decision but conspicuously missing from  
27 defendants’ brief, specifically held that “electronic signals were sufficiently tangible to support a  
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1 trespass cause of action.” See *Thrifty-Tel, Inc. v. Bezenek, et al.* (1996) 46 Cal.App.4th 1559,  
2 1565-1566 (unauthorized use of confidential codes to gain computer access to company's system  
3 and tie up system, in effort to crack company's access and authorization codes and make long-  
4 distance telephone calls without paying for them, was sufficient to constitute trespass).

5 **B. Redenbacher Claims More Than Theft of the Intangible Signal, and The Fact**  
6 **That the Electronic Signal Is Intangible Has No Relevance to Redenbacher’s**  
7 **Trespass Cause of Action**

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9 Defendants go on to argue that the fax transmittal is not a trespass, because a trespass  
10 requires physical damage. Defendants omit the fact that Redenbacher alleged that his ink and  
11 paper were consumed. So, the proposition cited by defendants, that entry by intangible phenomena  
12 *alone* cannot constitute trespass, is irrelevant. Redenbacher alleged more than just entry by  
13 intangible phenomena—he alleged an actual destruction (the printing on the paper) and a taking of  
14 ink. From Redenbacher’s perspective, it really wouldn’t have mattered if defendants sent an  
15 electric signal to initiate the trespass or that they broke into his office and stole paper and ink. The  
16 fact is, he (and apparently thousands of other Californians) was prevented from using his machine,  
17 and he is out paper and ink.

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19 Defendants’ case, *San Diego Gas & Electric Co. v. Superior Court*, 13 Cal.4<sup>th</sup> 893, is  
20 readily distinguished. That court addressed the issue of whether “wholly intangible electric and  
21 magnetic fields” that did not cause any physical damage could cause a trespass. According to the  
22 Court, “(r)ecovery allowed in prior trespass actions predicated upon noise, gas emissions, or  
23 vibration intrusions has, in each instance, been predicated upon the deposit of particulate matter  
24 upon the plaintiffs' property or on actual physical damage thereto.” *Id.*, 936. Redenbacher, of  
25 course, has pled physical damage.

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27 Given that defendants entire argument supporting the demurrer to trespass is based on the  
28 irrelevant *Intel Corp.* and *San Diego Gas* decisions, the demurrer to trespass should be

1 overruled.

2 **II. REDENBACHER ADEQUATELY ALLEGES A CAUSE OF ACTION FOR**  
3 **CONVERSION**

4 **A. Redenbacher Pled That Defendants' Conversion Was Substantial, Because He**  
5 **Pled That Defendants *Consumed* His Paper and Ink**

6 Redenbacher pled a cause of action for conversion<sup>3</sup> by alleging his ownership of paper and  
7 ink, which are tangible property, the defendants' *consuming* of the paper and ink, and his damages  
8 based on the consumption. FAC, pars. 27, 30, 35.

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10 Defendants allege that interference with property must be substantial to allow one to  
11 maintain a claim for conversion. Defendants then state that Redenbacher does not allege that he  
12 was prevented from exercising *all* rights of ownership in his personal property, namely paper and  
13 ink.

14 Defendants overlook the fact that Redenbacher states that defendants caused "the machine  
15 to print the unsolicited faxes by *consuming* paper and ink which were the property of plaintiff."  
16 FAC, par. 27. "Consume" is defined in Merriam-Webster on-line dictionary as "to do away with  
17 completely." In other words, Redenbacher pled that defendants prevented him from exercising *all*  
18 rights of ownership in his property.

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20 So, according to defendants' own authority, Redenbacher adequately pled a claim for  
21 conversion.

22 **B. The *Intel Corp.* Decision is Irrelevant to Redenbacher's Conversion Claim**

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24 For the same reasons that *Intel Corp.* has no bearing on the trespass claim, it has no bearing  
25 on Redenbacher's conversion claim.

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<sup>3</sup> See elements of conversion, Defendants' Demurrer Memorandum, page 3, lines 26-28.

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## CONCLUSION

Redenbacher believes that defendants may have sent thousands of two-page fax advertisements to Californians. California fax machines and printers have likely been tied up for the equivalent of days-on-end by defendants' advertising. All the while, defendants have shifted the costs of their advertising to their victims.

Given this cost-shifting and their attendant savings in advertising costs, defendants likely consider the small litigation risk to be an acceptable cost of doing business.<sup>4</sup> Indeed, most lawsuits against telemarketers are brought by *in pro pers* in Small Claims Courts, and the damages are small. Defendants likely make small payoffs and continue with their profitable law-breaking activities. To break this cycle, penalties must be levied, an injunction imposed, and substantial punitive damages must be assessed.

Defendants know this, and, since they appeared in this action, they have sought to postpone inevitable liability and drive plaintiffs' fees and costs up by raising a welter of frivolous, hypertechnical challenges to Redenbacher's Complaint and First Amended Complaint. First, defendants demurred and moved to strike the Complaint based on technicalities. Plaintiff filed the First Amended Complaint in response, and now defendants raise completely different substantive issues apparently calculated to delay and drive up costs even further.

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<sup>4</sup> *United Artists Theatre Circuit v FCC*, 147 F. Supp. 2d 965 (D.Ariz. 2000), for example, involved a defendant who was sued by only one of 90,000 persons to which it sent faxes.

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The game must stop, and defendants must be ordered to respond to the First Amended Complaint. Redenbacher requests that the Court overrule the demurrers and require defendants to file a response within ten days of the ruling, so that he can proceed towards a judgment that might prevent defendants from coming into California and breaking the law.

Date: \_\_\_\_\_/04

REDENBACHER & BROWN, LLP

By \_\_\_\_\_  
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